United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1117

To be argued by
Kenneth Kaplan

13 P/S

In the

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-1117

UNITED STATES OF AMERICA,

Appellee,

-against-

PEDRO LUIS ANSIN, JOSE JAUREQUI, a/k/a Aramis Fernandez, a/k/a Jose Torres, MARIO GARCIA, a/k/a Mamua, CARMELLA JINOKAUR, CHARLES SCHREIER and PEDRO CANALES,

Defendants.

PEDRO LUIS ANSIN,

Defendant-Appellant.

On Appeal From the United States District Court For the Southern District of New York

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BRIEF OF DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

Issues Presented for Review

1. Did the trial court's refusal to compel disclosure of an informer's identity deprive appellant of a fair trial?

2. Under totality of circumstances here existing, was the appellant's confession given freely and voluntarily?

The Indictment

The indictment filed against the defendant-appellant contained four counts and charged him in Count I with conspiring with defendants, Jose Jaurequi, Mario Garcia, Carmella Jinokaur, Charles Schreier and Pedro Canales to violate Federal Narcotic Laws from November 1, 1973 until March 4, 1974. Counts II and III charged the defendant with unlawful possession with intent to distribute cocaine with the defendant , Mario Garcia in Count II and with the defendant Jose Jaurequi in Count III.

Statement of the Case

Pedro Luis Ansin appeals from a judgment of conviction entered on March 4, 1975 in the United States District Court for the Southern District of New York after trial before Hon. Robert J. Ward, District Judge, and a jury.

The indictment contained four counts and charged the defendant in Count I with conspiracy to violate Federal Narcotic Laws under 21 USC 846, and in substantive Counts II and III with possession with intent to distribute cocaine under 21 USC 812, 841(9)(1) and 841(b)(1)(A).

The government introduced testimony by Drug Enforcement Agent Alleva of his meeting on November 13, 1974 with co-defendant Schreier, Schreier's girlfriend and an undisclosed informer at Michel's Diner, (transcript page 33); his subsequent cocaine purchase from Ansin at ElRelos bar (transcript page 45); his November 19, 1974 meeting with Ansin at Lum's Restaurant and his (Alleva's) receipt of a cocaine sample, (transcript page 48); his meeting on November 20, 1974 in the vicinity of 601 West 110th Street, with Ansin and co-defendant, Carmella Jinokaur, (transcript page 60) and a sale at La Bayonna Restaurant on November 26, 1974 (transcript page 63). Surveilling agents were in the immediate area of all meetings Alleva had with Ansin (transcript page 139, 214-215, 221, 289, 296, 305) although no one - agent, co-defendant, witness or informant - corroborated Alleva's testimony as to actual conversations or precise transactions, involving Ansin.

No electronic device was employed to record the events, (transcript pages 130, 138). The defendant's conviction rested in the main on Alleva's unsubstantiated testimony and Ansin's confession (transcript pages 26, 495-498, 890-891, 942) which was received into evidence.

An application to disclose the secret informant's identity was denied, (transcript page 127).

The defendant was found guilty on Counts I, II and III and was sentenced on March 4, 1975 to two years imprisonment followed by special parole of three years, and placed on probation for a period of five years on each of Counts II and III to be consecutive to term of imprisonment. He is eligible for parole under 18 USC 4208(a)(2).

On March 11, 1975, the defendant filed a notice of appeal and is now enlarged on bail pending determination of this appeal.

POINT I

The Interest of Justice Required That The Trial Court Compel the Disclosure of the Informer's Identity

Appellant Ansin's participation in the transaction of November 26, 1973 set forth in Count III and the

overt acts numbered 5 and 6 in the conspiracy count was testified to at length at a previous trial of Indictment No. 74Cr449 (transcript pages 110, 111), which indictment named Jaurequi and another. The trial of that indictment in which appellant was neither named nor tried, was held before the Hon. Robert J. Ward, D.J. without a jury. The disclosure of the informer's identity there, one Ronald Rogue, was freely made by the government, (transcript pages 110-112). Appellant's application in this case for disclosure of the identity of a different informer (transcript page 113) to aid the defense at the trial of the instant indictment 74Cr224, was first granted (transcript page 111) then denied (transcript page 127) notwithstanding the appellant's showing of necessity (transcript pages 110, 114-118).

The undisclosed informer was present and a material witness to all the transactions constituting the offenses set forth in the overt acts of the conspiracy count of the indictment numbered 1, 2, 3 and 4 and to all the transactions of November 13, 1973 which constituted the offenses set forth in the substantive Count II. The govern-

ment should have been required to disclose the informer's identity on the appellant's request (transcript pages 110, 114-116) since his identity was material, relevant and essential to the defense. The trial court's refusal to do so precluded the appellant from summoning and examining the informant who, as the testimony indicated, was continuously in the company of Agent Alleva and the appellant on November 13, 1974 (transcript pages 127-130; 160-162, 175). The informant was in a unique position to refute Alleva's testimony. He alone was available to cross-examine as to the accuracy of Alleva's recitation and testimony since the appellant chose not to testify, co-defendant Schreier was and still is a fugitive and Schreier's girlfriend's identity was unknown. The appellant was thus effectively precluded from effectively challenging Agent Alleva, thus conceivably showing the appellant's innocence or presenting a different picture of the events of that day to the jury. It precluded cross-examination on material matters as to the conversations held in Michel's Diner, (transcript pages 34-36), the automobile trip to the El Relos bar (transcript pages 36-40), and the transactions of November 13, 1974 and prevented the

appellant from preparing an adequate defense and rebuttal.

In United States ex rel Coffey v. Fay, 234 F. Supp. 543, 552 (D.C.N.Y.) 1964, rev. 344 F2 625 on remand (D.C.) 242 F. Supp. 382, aff'd. (C.A.2) 356 F2 460, Cert. denied 386 U.S. 1014, Judge Weinfeld held:

> "A restricted cross-examination is no substitute for independent countervailing evidence."

In Rovario v. United States, 353 U.S. 53, 60, 61, the Court held:

> "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the principal must give way."

The Rovario Court on pages 64, 65 further held:

> "This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses... We conclude that under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure."

See also People v. McShann; 50 Cal. 2d 802.

Privilege of the trial count to withhold disclosure of an informer's identity is subject to limitations and exceptions which are inherent in its logic and policy.

Said the court in Wilson v. United States, 59 F2 390, 392, (3 CA 1932):

> "If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled."

POINT II

The appellant's confession was not freely and voluntarily made and should not have been permitted to be used in evidence.

To be admissible in evidence, a statement, "must have been 'the product of an essentially free and unconstrained choice'." Shorey v. Warden, 401 F2 474, 479 (4th Cir.) Cert. Denied 393 U.S. 915 (1968).

A confession which is not freely and voluntarily given may not be used in evidence, and a conviction obtained through the use of an involuntary confession may not stand. Jackson v. Denno, 378 U.S. 368 (1964).

Ansin's confession was held under hostile, collusive and depressive conditions and overcame his will to resist. The circumstances of his confession show clearly that it was not freely and voluntarily given. Ansin, a Spanish national was never in trouble before (transcript page 402). Fatigue from sleeplessness, (transcript page 422), the lack of food, the alternate threats (transcript pages 406-408, 423, 424), followed by promises of leniency and freedom from prosecution (transcript pages 416, 427, 459), the refusal to permit a telephone call (419), the forced disrobing (transcript page 411) as well as the delay in arraignment (431) and the long confinement and interrogation by four government representatives (transcript page 422) compels the finding that Ansin's confession was not voluntary.

Ansin was arraigned one hour after the confession (transcript page 456) and eighteen hours after his arrest.

He had no sleep for 33 hours and he recalls no warnings, (transcript pages 431 and 408).

The totality of the effects of all of these factors compel the finding that Ansin's confession was not

voluntary. The confession was not "the product of a rational intellect and free will." Blackburn v. State of Alabama, 361 U.S. 199, 208 (1959) but rather the product of a, "will . . . overborne" Reck v. Pate 367 U.S. 433, 440 (1961).

Additionally, Ansin's confession was induced by promises of leniency. Considering the "totality of the circumstances", Boulden v. Holman, 394 U.S. 478, 480 (1969) Haynes v. Washington, 373 U.S. 503, 513 (1963), Ansin's statement was " 'obtained by any direct or implied promises, however slight'." Bram v. United States, 168 U.S. 532, 542 (1897) and thus the confession was not voluntary. If Ansin reasonably believed that a promise of leniency had been made to him, even though no such promise in fact had been made, and this belief induced his statement, the statement was not voluntary. Grades v. Boles, 398 F2d 409, 412 (4th Cir. 1968); United States v. Harris, 301, F. Supp. 996, 999 (ED. Wis. 1969); United States ex rel Caserino v. Denno, 259 F. Supp. 784, 790 (S.D.N.Y. 1966).

The appellant satisfied, the "totality of the

relevant circumstances" by which the voluntary admission of his confession is to be judged. Culombe v. Connecticut, 367 U.S. 586, 606 (1960); Davis v. North Carolina, 384 U.S. 737, 740 (1966) and United States ex rel Ward v. Mancusi, 414 F2 87, 89 (2d Cir. 1969).

CONCLUSION

The judgment of conviction should be reversed and judgment of acquittal entered, or a new trial should be granted appellant, by reason of the trial court's failure to disclose the informant's identity and suppress appellant's confession.

Respectfully submitted,

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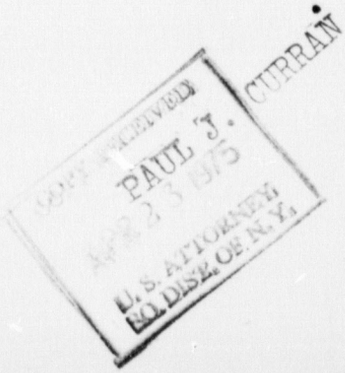
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